

AYER



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Control Module, Inc.

File: B-236417

Date: September 6, 1989

DIGEST

1. Protester's contention that it was improperly excluded from the competitive range for failure to demonstrate during a benchmark test that its equipment had a certain feature is untimely when not filed until after protester received notice of its exclusion from the competitive range since the benchmark manual clearly identified the feature as mandatory and protester was advised during the demonstration that the feature was required.

2. Protester's contention that equipment demonstration should not have been conducted on a pass/fail basis is untimely when not filed before the closing date for initial proposals since the terms of the demonstration were clear from the solicitation.

DECISION

Control Module, Inc. (CMI), protests actions of the Department of Commerce, Patent & Trademark Office, in connection with request for proposals (RFP) No. 52-PAPT-9-00006, for replacement computer equipment. The actions complained of led to the rejection of CMI's proposal when it was unable to demonstrate that its proposed equipment had certain mandatory features at a test demonstration of the equipment.

We dismiss the protest without obtaining an agency report on the merits since it is clear from material furnished by CMI and the information provided by Commerce that the protest is untimely. Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1988); Engineering Consultants & Publications, B-225982.2, Feb. 12, 1987, 87-1 CPD ¶ 158.

The RFP required offerors to meet all mandatory specification requirements found in Section C of the RFP. The benchmark manual which accompanied the RFP explained that

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offerors had to both pass certain benchmark testing described in the manual and demonstrate that the proposed equipment had 15 mandatory features listed in the manual. One of the mandatory features listed is "stacking," defined as the ability to "stack transactions at a terminal and transmit them with one key stroke."

The manual provided that eligibility for award depended on the proposed equipment passing all benchmark tests and demonstrations and that offerors would be notified if they had failed one or more tests after agency analysis of the test results. The manual provided two exceptions to the otherwise pass/fail nature of the testing. First, if a test was unsuccessful because of problems with the agency-provided mainframe computer, offerors would be given additional opportunities to rerun the test after the agency corrected the problem. Second, if a test was unsuccessful because of problems with the offeror's proposed equipment, the agency would notify the offeror of the failure, and the offeror could elect to rerun the benchmark.

At a pre-benchmark conference on May 23, 1989, CMI learned that the "stacking" feature listed in the benchmark manual referred to the ability of some of the agency terminals to send requests for data to the mainframe while in off-line mode. CMI asked the contracting officer about the solicitation's lack of a technical definition of the stacking requirement. CMI understood the contracting officer's answer to be that the agency would have to decide whether it really wanted the stacking feature and that if it did, the agency would issue an amendment defining stacking. The protester took this to mean that stacking was not a requirement unless and until the RFP was amended to define it. The contracting officer has a different view of what transpired. He states that he is not technically knowledgeable and that when CMI asked about stacking he did not know whether or not stacking was included in the RFP. Because of this he:

" . . . did not tell CMI that stacking was not presently in the specifications and that the RFP would have to be amended to include it. However, I may have told CMI that if stacking were not already required, the RFP would have to be amended to include it."

Later, the contracting officer discussed CMI's question with the agency program manager who advised that the requirement for demonstration of stacking was comprehended within the RFP's requirement for terminals capable of transmitting in block mode. Because of this understanding that stacking was

required by both the RFP and the benchmark, the contracting officer took no further action.

On May 31 and June 1, CMI performed the first benchmark. The parties agree that problems with the mainframe environment caused the agency to postpone the completion of the benchmark. The parties also agree that stacking was discussed, and that CMI was given a demonstration of the feature on an existing agency terminal.

At the resumption of the benchmark on June 19, it is undisputed that the agency asked CMI to demonstrate the stacking feature on its equipment. CMI, unable to comply, asked if the agency had a functional description available. The agency again demonstrated stacking on one of its existing terminals.

By letter dated July 19, received by the protester on July 21, the agency notified CMI that it had been excluded from the competitive range for failing to demonstrate stacking and three other mandatory requirements (keyboard features, message waiting feature, and the changing and loading of expendables). On August 3, CMI protested to our Office.

CMI first argues that stacking was not a mandatory feature, even though it was listed as such in the benchmark manual, because it was not included in the RFP itself and it was not defined in the manual. In our view, CMI was or should have been aware of its basis for protesting the stacking requirement after it received the benchmark manual. As noted above, the manual clearly listed stacking as a mandatory feature to be demonstrated at the benchmark testing. Thus, to the extent that CMI argues that (1) it was unclear whether stacking was required because the RFP allegedly did not specifically refer to the requirement; or (2) that a further definition of the feature was required, CMI was required to raise these issues within 10 days after April 5, the date CMI states it received the benchmark manual. See 4 C.F.R. § 21.2(a)(2); Comshare, Inc., B-192927, Dec. 5, 1978, 78-2 CPD ¶ 387.

Moreover, even if it had not been clear from the solicitation that stacking was a mandatory feature, CMI was notified at the June 19 benchmark testing that the agency intended to require stacking; thus, at the latest, CMI was on notice of its basis of protest as of June 19, and should have filed its protest within 10 days of that date. See Tameran, Inc., B-232126, Oct. 31, 1988, 88-2 CPD ¶ 416. Accordingly, since it was not filed until August 3, the protest is untimely.

CMI also contends that the agency improperly found that it failed to demonstrate three other mandatory features in addition to stacking. However, given that the record shows and CMI concedes that it failed to demonstrate the required stacking feature, its proposal was properly excluded from the competitive range since, as noted above, successful demonstration of all required features was a prerequisite to eligibility for award. Accordingly, since CMI was properly excluded on this basis, we need not address CMI's contentions regarding the three other mandatory features.

Finally, contrary to CMI's contention, there is no basis to conclude that CMI was entitled to another opportunity to show that it could successfully perform the demonstration. The benchmark manual clearly stated that offerors who failed to demonstrate all the required features would be ineligible for award, and provided for an opportunity to perform a second demonstration under only two circumstances, where the contracting officer determined that unsuccessful performance was due either to problems caused by the agency's mainframe computer or to malfunction of the offeror's equipment. The agency found, and CMI does not dispute, that neither of those circumstances was the cause of its unsuccessful demonstration; accordingly, CMI was not entitled to another opportunity to perform the demonstration.

To the extent that CMI argues that the agency should not have conducted the demonstration on a pass/fail basis, the protest is untimely. Since the terms of the demonstration were clear from the benchmark manual, CMI should have raised any challenge to them before initial proposals were due. See 4 C.F.R. § 21.2(a)(1). Instead CMI chose to compete under the ground rules announced by the agency and only now, after failing the demonstration, challenges them. Allowing an offeror to wait until the results of the demonstration are known to raise any challenges to the ground rules deprives the agency of an opportunity to take corrective action if appropriate at a meaningful stage of the procurement and is unfair to other offerors who assume the risk of competing in a pass/fail environment. See Comshare, Inc., B-192927, supra.

The protest is dismissed.



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